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JAMES H. McKENNEY,
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No. 312.

Brief of Atty. Gen.l (Boyd) for U. S.

Filed Nov. 26, 1897.

In the Supreme Court of the United States

OCTOBER TERM, 1897.

WILLIAM R. HALL, PLAINTIFF IN error,
vs.
THE UNITED STATES. } No. 312.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

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STATEMENT.

The plaintiff in error was convicted on an indictment under section 5467 of the Revised Statutes. The indictment (Rec., pp. 4, 5, and 6) contains three counts. The jury returned a verdict of guilty as charged in the indictment. After the verdict, upon motion of counsel for the plaintiff in error, the judgment was arrested upon the first and second counts, and pronounced by the court upon the verdict of guilty under the third count in the bill of indictment. For convenience, the third count of

the indictment, which is the one to be considered here, is copied in this brief, and is as follows:

> And the jurors aforesaid on their oath aforesaid do further present that William R. Hall, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the seventh day of September, in the year of our Lord one thousand eight hundred and ninety-six, at the southern district of New York and within the jurisdiction of this court, being then and there employed in a department of the postal service of the United States, to wit, as a clerk at Station F, a branch post-office of the United States in the said city of New York, did unlawfully, willfully, and feloniously steal, take, and carry away a certain United States Treasury note of the denomination and value of one dollar and three several silver certificates of the United States, each of the denomination and value of one dollar, the said Treasury note and the said silver certificates then and there being the money and property of one Joseph E. Jacobs, and the same Treasury note and the same silver certificates were then and there feloniously stolen and taken, as aforesaid, by the said William R. Hall from and out of a certain letter which then and there had come into his possession in his capacity as such clerk, as aforesaid, and by virtue of his said office and employment, and the said letter was directed in the tenor following, that is to say: "Mrs. Susan Metcalfe, No. 346 E. 24th st., New York City, N. Y.," and the same was then intended to be delivered by a letter carrier and had not then been delivered to the party to whom the same was directed, against the peace of the United States and their dignity, and contrary to the form of the statute of the United States in such case made and provided.

The assignments of error are based upon the refusal of the court below to instruct the jury as requested by the counsel for the plaintiff in error, as set forth in Record, page 20, as follows:

> Counsel for defendant then asked the court to direct the jury to acquit the defendant upon the following grounds:
>
> First. That all the evidence submitted by the Government fails to prove the crime charged in the indictment against the defendant, and the court should direct the jury to acquit the defendant.
>
> Second. A material allegation to be proved by the Government was the fact that the letter described in the indictment alleged to have been secreted, destroyed, or embezzled, and its contents stolen by the defendant, was intended to be delivered by a letter carrier, while the testimony of the witnesses for the Government, Jacobs and Dillon, proves that such letter was not intended to be delivered by a letter carrier. Wherefore a material allegation in the indictment is not only not proven, but absolutely disproved.
>
> Third. Upon the testimony of the Government witnesses, Dillon and Jacobs, the defendant can not be convicted of the crime charged in the indictment.
>
> Fourth. Upon all the evidence submitted by the Government the defendant can not be convicted of the crime charged in the indictment.
>
> Fifth. There is a fatal variance between the indictment and the proofs offered to sustain it by the Government, and the defendant ought not therefore to be convicted and his motion to acquit should be granted.
>
> Each of the foregoing motions to direct an acquittal of the defendant were denied by the court; to which refusals and each of them counsel for the defendant duly excepted.

POINTS AND ARGUMENT.

From an examination of the testimony in this case, it is ascertained that the letter alleged to have been stolen by the plaintiff in error was what is commonly known as a "decoy letter." It was a letter prepared by two post-office inspectors, namely, Joseph E. Jacobs and Edmond M. Dillon, and was addressed to a fictitious person at a fictitious number, namely, to Mrs. Susan Metcalfe, 346 E. 24th st., New York City, and in which were inclosed four one-dollar bills, marked so as to be capable of identification.

Hall, the plaintiff in error, was an employee of the Post-Office Department, being a regularly employed clerk in the Station F, at the branch post-office, New York City. (See testimony of Joseph E. Jacobs, beginning at Record, p. 11.)

The letter above referred to and another, which was also prepared by the two inspectors, were placed as special-delivery letters in the hands of one Baer, another post-office employee at Station F, on the 10th of September, 1896, about 20 minutes past 4 in the morning. (See testimony of Jacobs, Record, p. 12; also of Dillon, beginning Record, p. 13.)

Baer, the person to whom the letters were delivered by the inspectors, testified (Rec., p. 15) that he placed the two letters delivered to him by Jacobs and Dillon with other special-delivery letters at the station and put them on the special-delivery desk, where the special-delivery clerk was in the habit of getting the letters, and that at 5.20 a. m. on the same day of the delivery

he saw Hall take the batch of letters from the desk in which these two letters were included. The testimony shows further, and there is no contradiction of the fact, for the plaintiff in error introduced no evidence in the court below, that about 7.25 o'clock of the same morning on which the two special-delivery letters were mailed by the inspectors as before recited Hall was arrested and the four bills, which were identified as the four one-dollar bills inclosed in the letter by Jacobs in the presence of Dillon, found in his possession.

The only point for consideration is, therefore, as to whether the facts are sufficient to sustain the charge under the third count in the indictment, and, in the second place, whether there is variance between the allegations in this count and the proof introduced by the Government. It is decided that a letter addressed to a fictitious person, known to be such, is a letter within the meaning of the statute and for the purposes of Revised Statutes, section 5467. Also that a letter which bears the outward semblance of a genuine communication and comes into the possession of the employee in the regular course of his official business is a writing or document within the meaning of the statute. (Goode *vs.* U. S., 159 U. S., 663.) And, following up this case, it is held in Montgomery *vs.* U. S., 162 U. S., 410, that, in the trial of an indictment against a letter carrier charged with secreting, embezzling, or destroying a letter containing money in United States currency, the fact that the letter was a decoy was no defense. The carrier's duties are the same whether the letters are genuine or decoys.

Now as to the points raised by counsel for defendant in the court below.

The first two counts in the bill of indictment upon which the judgment was arrested charge that the defendant—

> did * * * secrete, embezzle, and destroy a certain letter directed and addressed in words and figures as follows, to wit: "Mrs. Susan Metcalfe, No. 346 E. 24th st., New York City, N. Y.," which said letter had been entrusted to the said William R. Hall, and had come into his possession in his capacity as such clerk and by virtue of his said office and employment, and was intended to be delivered by a letter carrier, and the said letter then contained articles of value—that is to say, three silver certificates of the United States, each of the denomination and value of one dollar, and one United States Treasury note of the denomination and value of one dollar.

The second count presents the charge in the same words, and, in addition, gives a copy of the letter and also a more specific description of the four one-dollar bills enclosed. (Rec., pp. 4 and 5.)

The court below arrested the judgment upon the first and second counts, upon the ground that the evidence did not sustain the charge that the letter was intended to be delivered by a letter carrier, it being the opinion of the court that it was essential for the Government to prove this fact, which was alleged in the indictment and was a material element of the offense as charged in this count. But this question is not for review in the court here, because, as before stated, the judgment was arrested on

counts one and two in the bill and judgment entered on count three, which we now come to consider.

The third count in the bill is under the last clause of section 5467 of the Revised Statutes, and, discarding that part of the section which describes the offense charged in the first and second counts of the bill, it would read as follows, as to the offense charged in the third count:

> Any person employed in any department of the postal service who shall * * * steal or take any of the things aforesaid out of any letter, packet, bag, or mail of letters which shall have come into his possession, either in the regular course of his official duties or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punished, etc.

The "things aforesaid" referred to are set forth specifically in the said section, and include a number of articles named and, among others, "any article of value." The articles of value charged in the third count of the bill are "a certain United States Treasury note of the denomination and value of one dollar, and three several silver certificates of the United States, each of the denomination and value of one dollar."

It is further charged in the third count that the said William R. Hall "did unlawfully, willfully, and feloniously steal, take, and carry away" these articles of value from and out of a certain letter which then and there had come into his possession in his capacity as such clerk as aforesaid (to wit, as a clerk at Station F, a branch post-office of the United States in the said city of New York)

and by virtue of his said office and employment. Then the direction of the letter is given in the bill, as follows: "Mrs. Susan Metcalfe, No. 346 E. 24th st., New York City, N. Y."

And there is the further averment in the bill: "*And the same was then intended to be delivered by a letter carrier,* and had not then been delivered to the party to whom the same was directed."

The contention of the plaintiff in error is that, it being alleged in the third count that the stolen letter was intended to be delivered by a letter carrier, the Government was required to prove this fact in order to support the charge in this count, and that the failure of the Government to prove such fact on the trial was a variance between the averment in the indictment and the proof; and further, that the defendant in the court below, upon the evidence, was entitled to have the court direct the jury to acquit on the ground that a material averment to be proved by the Government was the fact that the letter described in the indictment, and from which it was alleged the contents were stolen by the defendant, "*was intended to be delivered by a letter carrier*," and that the testimony of the witnesses for the Government, Jacobs and Dillon, proved that the letter was not intended to be delivered by a letter carrier. The answer to this is that, in order to constitute the offense under the clause of section 5467 before cited, it was not necessary to aver in the indictment that the letter was intended to be delivered by a letter carrier.

The necessary elements of this offense are that a person employed in any department of the postal service shall

steal or take an article of value out of a letter which shall have come into his possession either in the regular course of his official duties or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed. The letter in question bore the outward semblance of a genuine communication. It was placed in a regular depository for United States mail, namely, in Station F, a branch post-office of the United States in the city of New York. Hall was a person employed in a department of the postal service of the United States, namely, a clerk at this branch post-office. This letter came to him in the regular course of his official duty. It contained articles of value, to wit, one United States one-dollar Treasury note and three one-dollar United States silver certificates. When the letter thus came to his possession it was his duty as a faithful employee to pass it along in the ordinary way that it might reach the party to whom it was directed, and if such party could not be found, or the location indicated ascertained, the law provides for the disposition of the letter. But Hall did not undertake to do this. He broke open the letter and appropriated the contents to his own use. In other words, he stole it.

In this view of the case the averment in the indictment, "was intended to be delivered by letter carrier," is mere surplusage. Such an intent is not one of the ingredients or conditions of the statutory offense. It has no bearing on the defendant's acts, and it has no more connection with the offense described than any other private intention or private motive of the writer of the letter could have had. It is true that in some cases

unnecessary averments in regard to the description of the articles stolen have been held to constitute a fatal variance when the proof contradicted the particulars averred, because the particular description was a part of the identity of the article. But this principle has no application in this case, for the immaterial averment can not be said to be of that character. In the case of Montgomery *vs.* U. S., before cited, the indictment was very similar to this; in that case the averment in the third count of the indictment was that the letter was "*to be conveyed by mail and to be delivered to the person addressed.*" The proof showed that it was the intention of the Government officers who deposited the letter to withdraw it from the mails in case it was not stolen before it reached the person addressed. Upon this it was held that there was no variance, and the exception taken on the ground of a fatal variance was overruled. In U. S. *vs.* Wight, 38 Fed. Rep., 106, it is held that it is not necessary, in an indictment under the second clause of section 5467, R. S., for stealing the contents of a letter, to aver that the letter was intended to be conveyed by mail or mail carrier.

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